United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

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LOCAL 32B, SERVICE EMPLOYEES
INTERNATIONAL UNION, AFL-CIO,

Plaintiff-Appellant,

-v-

75-7346

SAGE REALTY CORP., THE WILLIAM
KAUFMAN ORGANIZATION, ROBERT
KAUFMAN, MELVYN KAUFMAN, ALLIED
MAINTENANCE CORP. and PRUDENTIAL
BUILDING MAINTENANCE CORP.,
LOUIS FEIL, WILLIAM KAUFMAN,

Defendants-Appellees.

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BRIEF OF APPELLEE SAGE REALTY CORP.

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BRIEF OF APPELLEE SAGE REALTY CORP.

THE ISSUES

1. Is appellee Sage Realty Corp. (Sage) a party to or otherwise bound by an agreement to arbitrate with appellant Local 32B? The Court below said no.

2. Is a contract between a union and a building owner and operator valid, which is not addressed to the labor relations of the owner or operator vis-a-vis his own employees but to the employees of commercial cleaning contractors under contract to the owner and operator?

3. Is a contract between a union and building owner or operator valid which provides that the owner and operator, when he first contracts with a cleaning contractor, shall require the contractor to assume the union agreement and, when the owner or operator contracts with a replacement

contractor, shall require the new contractor to assume the union agreement and to hire the employees of the old contractor assigned to that building?

4. Does the contract provision described in number 3 above violate Section 8(e) of the National Labor Relations Act or the antitrust laws, or both?

5. Is the issuance of an injunction warranted in this case under ordinary principles of equity?

NATURE OF THE CASE

Local 32B appeals from an order of Gagliardi, D.J., made on June 13, 1975 after hearing, which denied the union's application for a preliminary injunction.

Local 32B instituted this action under Section 301 of the Labor Management Relations Act to compel Sage and the Kaufmans (operator and owners of two New York City office buildings) to arbitrate and for injunctive relief.

Local 32B has a contract covering building service employees with Realty Advisory Board on Labor Relations Inc. (RAB) which contains an arbitration clause. The union asserts that Sage and the Kaufmans are members of RAB and therefore bound by the contract. Sage and the Kaufmans deny that they were ever members of RAB or that they ever employed any building service employees.

The occasion for the dispute is that Sage on June 1, 1975, replaced the commercial cleaning contractors

at these two buildings (Allied Maintenance Corp. [Allied] at 77 Water Street and Prudential Building Maintenance Corp. [Prudential] at 127 John Street) with Monahan Metal Cleaning Inc. (Monahan) at both buildings. The contracts had been let to Monahan after bids.

Local 32B contends that under Article I Section 4 of its contract with RAB, Sage and the Kaufmans must require Monahan to assume that contract and to hire the employees of Allied and Prudential formerly assigned to these buildings - or get a contractor who will. Local 32B sought a preliminary injunction to this effect and ordering Sage and the Kaufmans "to proceed forthwith to arbitration."

Sage and the Kaufmans assert that, assuming they were members of RAB, the contract is invalid as to them because they never employed any building service employees and because Article I Section 4 of that contract violates 29 USC Section 158(e) and antitrust laws.

The District Court, after hearing, denied the preliminary injunction on the ground that Local 32B had failed to establish that Sage and the Kaufmans were members of RAB. The Court did not reach the other issues.

FACTS

The ownership and operation of the two buildings.

Premises 77 Water Street, New York City, are owned by appellee Robert Kaufman and Max D. Spitzer and leased to appellees William Kaufman and Louis Feil. Premises 127 John Street, New York City, are owned by appellees Melvyn Kaufman and Max D. Spitzer and also leased to appellees William Kaufman and Louis Feil (40-41)*.

Both properties have been managed by Sage, a corporation whose stockholders are William Kaufman, Melvyn Kaufman and Robert Kaufman, since the inception of these premises in about 1970 (39-43). Sage, in turn, engaged Cushman & Wakefield Inc. (C&W) as renting and managing agent of these two buildings up to August 31, 1974 (42-43). During that period, C&W operated the buildings through wholly owned subsidiaries, first Property Maintenance Corp. (Property) and then Cushfield Maintenance Corp. (Cushfield) which employed their own building service employees in these buildings (44, 270-271, 277). The contract between Sage and C&W provided that "all persons necessary to be employed to maintain and operate the Building. . .shall be the Agent's and not Sage's employees" (271, Def. Ex. G).

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*Numbers in parenthesis refer to pages of the stenographic minutes.

Membership in RAB.

C&W applied for membership in RAB with respect to 77 Water Street in 1969 and with respect to 127 John Street in 1971. It listed one employee in each building. (Def. Ex. D and E). Neither Sage nor the Kaufmans ever made an application for membership in RAB with respect to these two buildings (265).

The purpose of RAB "is to service its members' labor problems relating to the maintenance and operation of its members' buildings" (Constitution, Art. I, Def. Ex.F). Membership "must be in behalf of some buildings in the City of New York", and while the application for membership must designate a person who will be the member, liability for dues, etc. extends "only to the person, firm or corporation owning, leasing or operating the building for which a membership is issued" (Constitution, Art. II, Def. Ex. F).

Membership is acquired by making written application, which must be approved at a meeting of the Board of Directors (By-Laws, Sec. 14, Def. Ex. F).

It is the practice of C&W to make application in RAB for each building which it manages; it does not notify the owners of such application unless the employees in the building are the employees of the owner (270-273). Where the employees in the building are the owner's employees, C&W obtains the owner's authorization before submitting an application on his behalf (279-280).

In this case C&W did not inform the owners or Sage of the application for membership in RAB since the building service employees were the employees of C&W (272-273, 278).

Pursuant to its membership in RAB covering the employees in these two buildings, C&W signed assents in September, 1972 to the then current RAB/Local 32B contract on behalf of these two buildings (275-276, Pl.Ex.3 and 6). Here again, C&W only signs assents for buildings in which it has its own employees (275-276). If it has no employees in a building, C&W signs an assent only if specifically authorized by the owner (280).

The assents for the two buildings here expressly named Cushfield as "Employer" and was executed by C&W as agent of the "Employer". Although William Kaufman Organization is named in these assents as the owner of the building, the assents are not signed by or on behalf of William Kaufman Organization.

On September 1, 1974, Sage took over the management of these two buildings from C&W (43). It employed no building service employees (288-289); it did not join RAB for these buildings (263).

C&W follows the practice of paying all bills received up to the 25th of the month. Bills received after that date are paid the following month (316-317). The semi-annual bills for RAB dues for these two buildings were received by C&W after August 25, 1974 and were approved for payment by C&W. When Sage took over these buildings on September 1, 1974, C&W turned over a batch of bills, including the RAB bills,

to Sage. Sage's disbursing department "paid them out as routine matter, inadvertently" (317).

These RAB bills covered the period from September 1, 1974 to February 28, 1975. During this period, on or about January 3, 1975, RAB and Local 32B entered into a new agreement (P1.Ex.11). This provides (Article I, Sec. 4) that an owner - called "Employer" - who contracts to have building service work contracted out, shall require the contractor to assume the union contract, and an owner who changes building service contractors must, in addition, agree that the employees who work in the building for the "initial contractor" shall become employees of "any successor contractor."

On or about January 9, 1975, Local 32B sent a letter to Sage (Def.Ex.C) asking that Sage institute the wage increases provided in the new collective agreement. It went on to say:

> "By complying with this request we will feel confident of your willingness to enter into a new agreement with us on the same basis as the Realty Advisory Board agreement to cover the employees in the above buildings."

McCulloch, the contract director of Local 32B (67), testified that this was a form letter "mailed to independant owners or agents who signed independent agreements with Local 32B" (69), "rather than RAB members" (76).

McCulloch's letter dated January 9, 1975 was actually received by Sage on February 26, 1975 (51). On March 5, 1975, Sage replied (P1.Ex.13) that it would make payments to employees in accordance with wage scales described in McCulloch's letter of January 9th, "without prejudice" and went on to say:

> "Inasmuch as we are not members of Realty Advisory Board, and inasmuch as we have not seen the final agreement, we will not make any further commitment."

McCulloch testified that his letter of January 9th (Def.Ex.C) was "mailed in error" (72). However he admitted that he learnt of the "error" only after "the union had decided to contest the right of Sage Realty to enter into. . .a contract with a new cleaning contractor" (78).

By letter dated January 17, 1975 RAB wrote to Sage under the impression that Sage was a member of RAB. By letter dated January 21, 1975 (Def. Ex.A and B), Sage and William Kaufman Organization wrote identical letters to RAB, saying in part:

> "We are in receipt of your letter of January 17, 1975 and we wish to advise you that you are in error. We are not now nor do we intend to be, members of Realty Advisory Board on Labor Relations Inc."

Sage replaces the cleaning contractors at these buildings

Premises 77 Water Street and 127 John Street have always been cleaned by commercial cleaning contractors who supplied the service with their own employees (44). While C&W was the managing agent, it employed Allied to clean 77 Water Street and Prudential to clean 127 John Street (44, 73).

Commercial building cleaning is a sizable industry (see Manhattan Yellow Pages "Metal Cleaning", "Office Cleaning", etc.) Allied and Prudential are large enough to be engaged in interstate commerce within the meaning of the Labor Management Relations Act of 1947 (complaint, para. 10). Allied's stock is listed on the New York Stock Exchange (complaint, para. 8). Local 32B has contracts with Allied and Prudential covering their employees at their many locations, including 77 Water Street and 127 John Street (73).

On or about April 29, 1975 Sage advised Allied and Prudential that their contracts to clean these buildings were terminated pursuant to their terms as of May 31, 1975. Neither Allied nor Prudential raised any objection (44-45). They notified Local 32B by letter dated May 5, 1975 that their contracts to clean these two buildings had been cancelled (Ex. F and G annexed to moving affidavit of John Sweeney).

Sage contracted to have these two buildings cleaned by Monahan, effective June 1, 1975 (45, 211-212). Monahan has a collective labor agreement covering its employees with Teamsters Local 803 (138, 150, 165, 170).

Although Allied and Prudential are defendants here, neither Monahan nor Teamsters Local 803 is a party to this action.

On June 1, 1975, Monahan commenced cleaning these buildings with its own labor force (141). Pursuant to a stipulation in open court, made to avoid a decision with respect to a temporary restraining order, Sage agreed to use its best efforts to have Monahan continue to employ the employees of Allied and Prudential working at these two buildings on May 31, 1975 and to pay them 32B wage rates for one week (132).

As of May 31, 1975 Allied employed 12 employees at 77 Water Street and Prudential employed 14 at 127 John Street (205,215,248,252).

Local 32B sues Sage and the Kaufmans to compel Monahan to assume the 32B contract and to hire the employees of Allied and Prudential assigned to these buildings - or get a contractor who will.

On May 23, 1975, while Allied and Prudential were still cleaning these two buildings with the 26 employees mentioned above, Local 32B demanded arbitration. Although

there is no allegation much less proof, that Allied and Prudential were about to lay off these 26 employees instead of assigning them to other locations (See e.g. 153), Local 32B asked the arbitrator to direct the owners and operator of these two buildings (a) to comply with Article I of the Union/RAB contract, (b) to require Monahan to assume that contract and to offer employment to all employees of Allied and Prudential then employed at these buildings and (c) to refrain from entering into a cleaning contract with anyone until the conditions of (a) and (b) were complied with (See Ex.J annexed to moving affidavit of John Sweeney).

On May 28, 1975, Local 32B instituted this action to compel arbitration with these objectives, and simultaneously moved for a preliminary injunction. After hearing, the District Court denied the application for a preliminary injunction upon the ground that "plaintiff has not met its burden of showing defendant's membership in the RAB."

POINT I

SAGE AND THE KAUFMANS ARE NOT PARTIES TO OR OTHERWISE BOUND BY AN AGREEMENT TO ARBITRATE WITH LOCAL 32B.

Local 32B brought this action to compel arbitration. The duty to arbitrate is based on contract.

In Wiley & Sons v. Livingston, 376 U.S. 543, the Court said (at page 547):

> ". . .The duty to arbitrate being of contractual origin, a compulsory submission to arbitration cannot precede judicial determination that the collective bargaining agreement does in fact create such a duty."

The Court below found that there was no contract calling for arbitration in existence between Local 32B and Sage or the Kaufmans. It is undisputed that there is no contract directly between these parties. The Court below rejected the argument of Local 32B that Sage and the Kaufmans were bound by the RAB/Local 32B contract (Pl. Ex.11), upon the ground that 32B had failed to prove that Sage or the Kaufmans were members of RAB. We refer the Court to the evidence marshalled by the Court below in support of its decision.

In addition we call attention that the By-Laws of RAB provide (Section 14, Def. Ex.F):

> "Any person, firm, association or corporation desiring to obtain a membership or memberships for one or more buildings owned or operated in the City of New York shall apply therefor in writing to the Secretary."

Thus, membership in RAB is available to operators as well as owners and requires a written application. The By-Laws go on to provide that the application must be formally approved.

The only applications for membership in RAB involving 77 Water Street and 127 John Street were made by C&W while they operated these buildings (Def.Ex.D and E). It is undisputed that neither Sage or the Kaufmans ever submitted an application for membership in RAB (263).

Since the purpose of RAB is "to service its member's labor problems" (Constitution Article I, Def. Ex.F), it is pertinent to inquire who was the employer of the building service employees covered by RAB/Local 32B contracts involved here (Pl.Ex. 10 and 11).

The evidence is clear, and was accepted by the Court below that C&W employed building service employees in these buildings up to August 31, 1974 when its contract as managing agent was terminated (276-277, 280). Pursuant to its membership in RAB covering these employees, C&W signed assents in September, 1972 to the then current RAB/Local 32B contract (Pl. Ex. 3 and 6). These assents named Cushfield as "employer" and were executed by C&W as agent of the "employer."

At no time has Sage or the Kaufmans employed any building service employees at these buildings (288-289, 295-296, 304-305). Therefore, Sage or the Kaufmans never had any labor problems requiring servicing by RAB.

Appellant's Brief, Point I, contends that the "resignation" of Sage and the Kaufmans from RAB was "untimely", and discusses at length the subject of "untimely withdrawal" from an employers' association by one of its members. The argument is beside the point. Sage did not resign from RAB; Sage was never a member of RAB. The letters of January 21, 1975 (Def. Ex. A and B) are not resignations but the correction of an error.

Local 32B also argues that C&W's membership in RAB with respect to these two buildings is binding upon Sage or the owners because "C&W was clearly an agent of a disclosed principal" (Appellant's Brief, page 15). This is not so.

C&W's application for membership in RAB was made in its own name as agent for certain buildings (Def.Ex. D and E). C&W had employees in those buildings (270-271). When C&W executed assents to the 1972 RAB/Local 32B contract, it named Cushfield, its own subsidiary, as the employer of the employees covered by that agreement and itself as agent for the employer (Pl. Ex. 3 and 6).

Local 32B argues (Appellant's Brief, page 15) that the agreement between Sage and C&W designates C&W as managing agent of these buildings (Def.Ex.G) and that paragraph "Second (a)" of that agreement requires C&W to hire, pay and supervise "all persons necessary to be employed to maintain and operate the Building, who, in each instance shall be the Agent's and not Sage's employees." Appellant's Brief goes on to argue (page 15) that this provision "is immaterial and a mere matter of form," because C&W was the agent of Sage and paid these employees out of rent monies collected and remitted the balance to Sage.

We suggest that a multitude of laws, federal, state and city, imposes a host of duties upon an employer and, therefore, the question of who is the employer can never be immaterial or a mere matter of form.

The agreement between Sage and C&W expresses the intention of the parties that any building service employees employed by C&W were to be the employees of C&W, not Sage. C&W thereby became liable to pay wages to these employees, to pay a multitude of employee related taxes, to carry Workmen's Compensation Insurance, etc., regardless of the source from which C&W obtained the funds for these purposes. C&W had assumed the liability to pay these charges.

These employees of C&W working in these buildings were the very employees who were covered by the 1972 RAB/ Local 32B contract. Under that contract, C&W paid to Local 32B the Welfare and Pension payments due under that contract for these employees. Sage or the Kaufmans did not make these payments. Local 32B dealt with C&W in these matters. This was C&W's obligation as employer.

C&W's contract with Sage as managing agent was terminated as of August 31,1974 and since that time there have not been any building service employees employed at these buildings by Sage or the Kaufmans.

Therefore after August 31, 1974 there was no occasion for Sage or the Kaufmans to have RAB service their labor problems because they employed no building service employees. Sage or the Kaufmans could not be parties to the 1975 RAB/Local 32B contract covering building service employees (Pl. Ex. 11). Similarly, since Local 32B represented no building service employees at these buildings employed by Sage or the Kaufmans, Local 32B could not enter into a labor agreement with the latter.

A Union can enter into a collective labor agreement only if it represents a majority of employees employed by an employer in an appropriate bargaining unit. 29 USC Section 159(a).

Allied and Prudential, the commercial cleaning contractors at these buildings up to May 31, 1975 did employ building service employees and they had their own collective labor agreement with Local 32B covering these employees at these locations (73). These agreements are not involved here.

For the foregoing reasons, Sage and the Kaufmans were not bound by any agreement to arbitrate with Local 32B.

POINT II

THE PROVISIONS OF THE LOCAL 32B/ RAB CONTRACT WHICH THE UNION SEEKS TO ENFORCE HERE ARE INVALID.

In Hoh v. Pepsico, Inc. 491 F.2d 556 (2 Cir.1974), this Court said (at page 561):

> "Furthermore, the 'ordinary principles of equity' referred to as a guide in the portion of the Sinclair dissent that was approved in Boys Markets include some likelihood of success. At least this much is required by Judge Frank's liberal formulation in Hamilton Watch Co. v. Benrus Watch Co., 206 F.2d 738,740 (2 Cir. 1953). We think this must mean not simply some likelihood of success in compelling arbitration but in obtaining the award in aid of which the injunction is sought. Although courts have been directed by the Steelworkers' Trilogy, 363 U.S. 564, 574, 593, 80 S.Ct.1343,1347,1358, 4 L.Ed.2d 1403, 1409, 1424 (1960), to be liberal in construing agreements to arbitrate, this instruction does not extend to the grant of ancillary relief; on such a matter they must continue to exercise the sound discretion of the chancellor. It would be inequitable in the last degree to grant an injunction pending arbitration which was costly to a defendant on the basis of a claim which although arguably arbitrable was plainly without merit."

A. A CLAIM ARISING OUT OF AN ILLEGAL CONTRACT IS NOT A LEGITIMATE SUBJECT OF ARBITRATION.

Assuming that there is a duty to arbitrate, we urge that Article I Section 4 of the 1975 Local 32B/RAB contract is invalid. Therefore, Local 32B has no likelihood of success "in obtaining the award in aid of which the

injunction is sought."

Article I, Section 4 purports to compel an owner or operator who contracts to have his building cleaned by a cleaning contractor, to require the contractor to assume the union contract and, when changing cleaning contractors, to require the new contractor to hire the employees of the old contractor and to assume the 32B contract. The provision ignores that the contractor may have his own employees covered by a different union contract.

Certain facts basic to a consideration of this problem are uncontroverted.

The owners and operator of these buildings have never cleaned the buildings themselves and have never employed any building service employees to perform that service. They have always taken bids on providing the service. Allied and Prudential did the work up to May 31, 1975, operating under their own contract with Local 32B and employing their own building service employees. Monahan was low bidder and replaced Allied and Prudential since June 1, 1975.

Monahan has a contract with Teamsters Local 803 and came in to clean the buildings with its own crew covered by that contract. Allied and Prudential are still in business at other locations and still have employees who are covered by a 32B contract with these contractors.

Plaintiff now contends that the property owners and Sage should compel Monahan to assume the 32B contract and to hire the employees of Allied and Prudential who worked at these buildings, regardless of Monahan's contract with Teamsters Local 803.

Neither Sage nor Monahan is a successor of Allied and Prudential.

Sage is not "a successor" of Allied and Prudential in the sense that any duty has devolved on Sage to hire the employees of Allied and Prudential. Sage has never cleaned these two buildings with its own employees; it has never hired any building service employees; it has always had these two buildings cleaned by commercial cleaning contractors.

Nor is Monahan "a successor" of Allied and Prudential in the sense that any duty has devolved on Monahan, by virtue of being the low bidder on the contract to clean these buildings, to hire the employees of Allied and Prudential en masse. Monahan has its own crew and its own union contract with Teamsters Local 803 covering that crew.

Monahan is a stranger to Allied and Prudential, having acquired the contract not by purchase but by bid. Monahan did not purchase any assets or property of Allied or Prudential.

It is clear therefore that the successorship principle urged by plaintiff is not applicable here.

See Howard Johnson Co. v. Hotel Employees, 417 U.S. 249 (1974); NLRB v. Burns International Security Service, 406 U.S. 272 (1972); Tri State Maintenance Corp. v. NLRB, 408 F.2d 171 (D.C. Cir. 1968); Triangle Maintenance Corp. 194 NLRB 486; Lincoln Private Police Inc., 189 NLRB 717.

In Howard Johnson Co. supra, the Union sought arbitration against the buyer of the business based on the Union's agreement with the seller. The Supreme Court said (417 U.S. at pg. 261,262):

> "What the Union seeks here is completely at odds with the basic principles this Court elaborated in Burns. We found there that nothing in the federal labor laws 'requires that an employer . . . who purchases the assets of a business be obligated to hire all of the employees of the predecessor though it is possible that such an obligation might be assumed by the employer' (citing cases). Clearly Burns establishes that Howard Johnson had the right not to hire any of the former Grissom employees, if it so desired. The Union's effort to circumvent this holding by asserting its claims in a Sec. 301 suit to compel arbitration rather than in an unfair labor practice context cannot be permitted.
> "We do not believe that Wiley requires a successor employer to arbitrate in the circumstances of this case."

In Tri State Maintenance Corp. v. NLRB, supra, the General Services Administration changed the cleaning contractor at the Veterans Administration Building in Washington, D.C. The old contractor had a contract with Local 536 of the Building Service Employees Union. The Labor Board held that the new contractor was guilty of unfair labor practice

for his refusal to hire the employees of the old contractor "as a group." However, the Court said (408 F.2d at page 173):

> "In the long history of labor law in this jurisdiction there simply is no authority which would require a maintenance corporation which contracts to service a building for a one year period to hire 'en masse' the entire work force employed by the corporation or sole proprietor which or who had contracted to service the building for the previous one year period. (citing cases) Here, Tri State had no privity of contract with Frugal or Frugal's employees and it was not a 'successor employer' that bought out the business of another. (citing cases) In fact, GSA expressed dissatisfaction at the work being done by the very people the Board would require petitioner to hire as a group."

Amalgamated Food Employees, etc. v. National Tea Co., 346 F.Supp 875, relied on by plaintiff, is clearly distinguishable. There the Union sued National Tea in a controversy involving the employees of National Tea. The injunction which was issued restrained National Tea from terminating and/or laying off any of its employees; it enjoined National Tea to engage in any lockout of its employees; and it directed National Tea to "meet with its employees' representatives."

In the case at bar, the owners and operator of these two buildings have not laid off any of their building service employees or locked them out - they have never employed any such employees.

For these reasons the National Tea case is not in point.

B. ARTICLE I, SECTION 4 OF THE LOCAL 32B CONTRACT IS ILLEGAL AND AGAINST PUBLIC POLICY.

The union seeks to submit to arbitration and to enforce Article I Section 4 of its contract (Pl. Ex. 11; also Exhibit J annexed to moving affidavit of John Sweeney). We urge that this provision is illegal and against public policy; it violates 29 USC Sec. 158(e) and the antitrust laws. The right which the union seeks to enforce here is "of a character inappropriate for enforcement by arbitration." Wilko v. Swan, 201 F.2d 439, 444 (2 Cir. 1953).

The arbitration of issues arising under the antitrust laws have been held to be inappropriate. American Safety Equipment Corp. v. J.P.Maguire & Co. 391 F.2d. 821 (2 Cir. 1968); A.E.Plastik Pak Co. v. Monsanto Co., 396 F.2d 710 (9 Cir.1968); Helfenbeim v. Int. Industries, Inc., 438 F.2d 1068, (8 Cir.1971); Arbitrability of Federal Antitrust Claims, 3 ALR Fed. 918.

Claims under the securities act have been held inappropriate for arbitration, under the Supreme Court's decision in Wilko v. Swan, 346 US 427 (1953), Coenen v. R.W. Pressprich & Co., 453 F.2d 1209, 1213, (2 Cir. 1972).

Similarly questions of patent validity are inappropriate for arbitration proceedings. Beckman Instruments, Inc. v. Technical Development Corp., 433 F.2d 55 (7 Cir. 1970), cert. den. 401. US 976. In the same fashion and for the same reasons a claim based upon a contract clause which violates 29 USC Sec. 158(e) is not merely a private matter. The prohibition of hot cargo clauses is designed to promote

national interest and to put a limitation upon union activities. The pervasive public interest in the enforcement of the statute would not be advanced by submission to arbitration. As the Supreme Court said in Alexander v. Gardner-Denver Co., 415 US 36, 57 "specialized competence of arbitrators pertains primarily to the law of the shop, not the law of the land."

Nor is the subject foreclosed by the statement in United Optical Workers Union v. Sterling Optical Co., 500 F.2d 220, 224 (2 Cir.1974), that the validity of the contract provision under 29 USC Sec. 158(e) "is an issue lying initially in the exclusive province of the arbitrator." This was expressed as obiter dictum.

Article I, Section 4 of the contract violates 29 USC Sec. 158(e)

The essence of a hot cargo agreement forbidden by 29 USC Sec. 158(e) is that it pressures an employer to cease doing business with a third person in order to persuade the third person to accede to the union's objectives. Lewis v. Seanor Coal Co., 382 F.2d 437 (3 Cir.1967) cert. den.390 US 94.

If the object of the agreement is to benefit the employees of the contracting employer, the agreement is primary and valid but if the object is to pressure an outside employer to accede to union objectives, it is secondary and invalid. A Duie Pyle Inc. v. NLRB, 383 F.2d 772 (3 Cir.1967) cert. den. 390 U.S.905.

As the Supreme Court said in National Woodwork Mfrs. Assn. v. NLRB, 386 U.S. 612 (1967) at page 645:

> ". . .The touchstone is whether the agreement or its maintenance is addressed to the labor relations of the contracting employer vis-a-vis his own employees."

In the case at bar, Sage is the employer allegedly bound to the RAB/Local 32B contract as a member of RAB. However the contract does not address itself to the labor relations of Sage vis-a-vis its building service employees. Neither Sage nor the owners have any such employees. Article I, Section 4 of the contract is being used to require Sage to cease doing business with Monahan in order to persuade Monahan to accede to the union's objectives, which are to have Monahan hire the employees of Allied and Prudential.

In NLRB v. Nat. Maritime Union, 486 F.2d 907 (2 Cir. 1973), the NMU had a contract with shipowner A that if the latter sold a ship to a shipowner not already under contract with NMU, the ship will be sold with a crew provided by NMU, and shipowner A will obtain from the purchaser an undertaking to abide by the NMU contract. Thereafter, shipowner A sold a ship to shipowner B whose employees were represented by SIU. The question before the court was whether the NMU contract provision violated 29 USC Sec. 158(e).

The court followed the established distinction between "union standards" and "union signatory" sub-contracting clauses. The former, which restrict sub-contracting to those who observe certain pay scales and conditions of employment, are valid. The latter, which permit unit work to be transferred to other employers only if they are under contract with the union, are illegal.

The statement in Appellant's Brief (page 35) that the Court in the National Maritime Union case approved a work preservation clause "for employees already employed at a particular job site" is wrong. The Court (486 F.2d at page 912) pointed out that the test is

> "whether, under all the surrounding circumstances, the Union's objective was preservation of work for [the employer's] employees, or whether the agreements. . .were tactically calculated to satisfy union objectives elsewhere." (National Woodwork Mfrs. Assn. v. NLRB, 386 U.S 612, 645).

Sage's employees are not at all involved in the case at bar.

Thus "union signatory" clauses have been held illegal where the employer agrees not to subcontract to one who has not executed the agreement (NLRB v. Joint Council, 338 F.2d 23) or agrees not to subcontract without the union's prior approval (ibid), or which limit subcontracting to employers having a contract with the same union (Bakery Wagon Drivers v. NLRB, 321 F.2d 353) etc.

In Associated Musicians of Greater New York, 203 NLRB No. 163, the labor board held illegal an agreement between a caterer which employed no bands or orchestras and a union by which the caterer agreed to permit only union members to conduct orchestras or provide musical services to its patrons, in accordance with which caterer's contracts with patrons engaging its catering facilities required that only union musicians be employed on premises.

Article I, Sec. 4 of the contract at bar is an illegal "union signatory" clause.

In sum, this is not a primary dispute between Local 32B and Sage involving Sage's employees. This is a secondary dispute involving the employees of Allied and Prudential. The union is pressuring Sage to compel the latter to require Monahan to replace its Teamsters' contract with the Local 32B contract and to hire the employees of Allied and Prudential.

This is not a work preservation provision.

Appellant's Brief (pages 35-38) argues that the provisions of Article I of the contract are intended to be a "work preservation provision." Work preservation for whose employees? As applied here the provision is not being applied to preserve the work of Sage's employees. The provision is being applied to preserve the work of employees of Allied and Prudential who are strangers to the contract and to Sage.

Article I Section 4 of the contract violates the federal antitrust laws.

On June 2, 1975, the United States Supreme Court decided Connell Co. v. Plumbers & Steamfitters, -US- 44 L.Ed. 2d 418. The court held that a union's agreement with a general contractor having no employees requiring the general contractor to let subcontracts for certain work only to firms that were parties to the union's current contract was not exempt from the federal antitrust laws. The Court observed (44 L.Ed.2d at p. 418):

> ". . .The agreements with general contractors did not simply prohibit subcontracting to any non-union firm; they prohibited subcontracting to any firm that did not have a contract with Local 100. The union thus had complete control over subcontract work offered by general contractors that had signed these agreements."

These observations apply to Article I, Section 4 of the contract involved here which, like the contract involved in Connell, supra, (44 L.Ed.2d 427-428).

> ". . .made non-union subcontractors ineligible to compete for a portion of the available work. This kind of direct restraint on the business market has substantial anticompetitive effects, both actual and potential, that would not follow naturally from the elimination of competition over wages and working conditions."

In Connell, the District Court had held that "the subcontracting agreement was exempt from federal antitrust laws because it was authorized by the construction industry proviso to Sec. 8(e) of the National Labor Relations Act."

(44 L.Ed.2d at p. 425). The Court of Appeals affirmed. The Supreme Court held that the agreement was outside the construction proviso of Section 8(e) and also subject to the federal antitrust laws.

The Court's discussion in Connell makes plain that the validity of Article I, Section 4 of the contract at bar, whether considered in the light of 29 USC Sec.158(e) or the antitrust laws, is "inappropriate for enforcement by arbitration." American Safety Equipment Corp. v. J.P. Maguire & Co., 391 F.2d at p. 825.

In the light of these circumstances we suggest that Local 32B has failed to show "some likelihood of success . . .in obtaining the award in aid of which the injunction is sought." Hoh v. Pepsico Inc., 491 F.2d 556, 561.

POINT III

THE ISSUANCE OF A PRELIMINARY INJUNCTION IS NOT WARRANTED UNDER ORDINARY PRINCIPLES OF EQUITY.

In Boys Markets, Inc. v. Retail Clerks Union, 398 U.S. 235 (1970), the court adopted the following "principle for the guidance of the district courts in determining whether to grant injunctive relief" saying (398 U.S. at pg. 254):

> "A District Court entertaining an action under Section 301 may not grant injunctive relief against concerted activity unless and until it decides that the case is one in which an injunction would be appropriate despite the Norris-LaGuardia Act. When a strike is sought to be enjoined because it is over a grievance which both parties are contractually bound to arbitrate, the District Court may issue no injunctive order until it first holds that the contract does have that effect; and the employer should be ordered to arbitrate, as a condition of his obtaining an injunction against the strike. Beyond this, the District Court must, of course, consider whether issuance of an injunction would be warranted under ordinary principles of equity - whether breaches are occurring and will continue, or have been threatened and will be committed; whether they have caused or will cause irreparable injury to the employer; and whether the employer will suffer more from the denial of an injunction than will the union for its issuance." 370 US, at 228, 8 L Ed 2d at 460. (Emphasis in original.)

Following these principles, we now "consider whether issuance of an injunction would be warranted under ordinary principles of equity."

It is not likely that plaintiff will prevail at the trial on the merits.

We pointed out (Point I, supra) that Local 32B has failed to show likelihood of success in compelling arbitration because there was no contract between the parties to that effect.

We also pointed out (Point II, supra) that Local 32B has failed to show likelihood of success in obtaining an award in aid of which the injunction is sought because the contract it seeks to enforce violates federal law and public policy.

Plaintiff has failed to show irreparable harm.

Appellant's Brief (pages 22-28) argues in substance that loss of jobs establishes irreparable injury.

In Sampson v. Murray, 415 U.S. 61 (1974) the Court said (at pg. 89-90):

> ". . .The Court of Appeals intimated that either loss of earnings or damage to reputation might afford a basis for a finding of irreparable injury and provide a basis for temporary injunctive relief. We disagree.
>
> Even under the traditional standards of Virginia Petroleum Jobbers, supra, it seems clear that the temporary loss of income, ultimately to be recovered does not usually constitute irreparable injury. In that case the court stated:
>
> 'The key word in this consideration is irreparable. Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough.'"

In Sanders v. Air Line Pilots Association, 473 F.2d 244 (2 Cir. 1972) this Court said (at pg. 248-249):

> "The requirement that a party seeking a preliminary injunction demonstrate that it will suffer irreparable harm in the absence of preliminary relief necessitates more than a mere showing that the party seeking relief will see its relative position deteriorate. Preliminary injunctive relief is extraordinary relief. It requires a convincing demonstration that the balance of hardships tips decidedly toward the moving party.. . .The principal reason for this is our belief that the Grandfathers, should they prevail at the trial on the merits, can be made whole without a preliminary injunction. Monetary damages, whether in the form of back pay or otherwise, will of course be available, as will appropriate affirmative relief. Placing this consideration alongside the very real burdens that would inure to appellees should a preliminary injunction issue of the breadth and vagueness of that sought, we hold that the district court's denial of the preliminary injunction should be affirmed."

If Local 32B prevails at the trial on the merits, it can be made whole without a preliminary injunction. The standard remedies of reinstatement with back pay or other monetary damages will of course be available as will appropriate affirmative relief. These considerations, especially when viewed in the light of the balance of equities, call for a denial of a preliminary injunction here.

The balance of equities lies with defendants.

Finally, as noted in Boys Markets, supra, we consider whether Local 32B "will suffer more from the denial of an injunction than will (Sage and the Kaufmans) from its issuance." The preliminary injunction sought here does not preserve the status quo pending final determination. The status quo on May 28, 1975 had Allied and Prudential winding up their contracts to clean these buildings. On June 1,1975, Monahan came in to do the job with its own crew.

It is clear that the granting of the preliminary injunction requested in this case would give to Local 32B all the advantage which it could obtain as a result of a final adjudication of the controversy in its favor.

The granting of such an injunction would also interfere greatly with the cleaning and maintenance of these two large office buildings. For over a month, since June 1, 1975, the buildings have been cleaned by Monahan with its own crew covered by a contract with Teamsters Local 803.

The granting of such an injunction would require Sage and the Kaufmans to direct Monahan to hire the employees of Allied and Prudential formerly assigned to these buildings and to assume the Local 32B contract.

Monahan might refuse to do so. After all, the contracts of Allied and Prudential were terminated because of Sage's dissatisfaction with the work done by the very people Local 32B would require Monahan to hire.

It is reasonable to anticipate that Teamsters Local 803 would refuse to permit Monahan to assume the Local 32B contract.

Who, then, would clean the buildings?

It is Sage and the Kaufmans who would suffer irreparable injury if Monahan refused to fire its present crew who are members of Teamsters Local 803, to replace them with members of Local 32B, and, finally, refused to replace its present Teamsters' contract with the Local 32B contract.

We submit that a preliminary injunction in this case would not be warranted under ordinary principles of equity.

CONCLUSION

The order of the District Court denying a preliminary injunction should be affirmed.

Dated: New York, New York
July 7, 1975.

Respectfully submitted,

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Sage Realty Corp.

HAROLD DUBLIRER
of Counsel

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ROSENMAN COLIN KAYE PETSCHEK FREUND & EMIL
ATTORNEYS FOR

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ISRAELSON & STREET